IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners*,

vs.

CHESTER BOWLES, Price Administrator, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
OPINION BELOW

The opinion (R. 63-69) of the United States Emergency Court of Appeals was rendered on August 4, 1944, and is not yet reported.

II
JURISDICTION

The judgment of the Emergency Court was entered on August 4, 1944. (R. 70.) The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. § 924(d).

III
STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-4 herein) and it is incorporated here by reference.

IV
SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.

2. The Emergency Court erred in failing to hold that the respondent was without authority to establish maximum prices for California table grapes in the absence of the determination and publication of certain prices as required by the statute as conditions precedent.

3. The Emergency Court erred in holding (R. 64-65) that the *average* 1942 price received by California table grape growers for all varieties is the criterion in any event.

4. The Emergency Court erred in holding (R. 68) that the action of the respondent in fixing a uniform maximum price for all California table grapes, subject only to differentials for seasonal sales, was not arbitrary or capricious and that it did not bring about a change in any established business practice in the industry, and in failing to hold that such action was in violation of the statutory prohibition against the elimination or restriction of the use of brand names, and against the standardization of any commodity.

5. The Emergency Court erred in holding (R. 66) that the maximum prices established by the respondent are not below the minimum set by the statute.

6. The Emergency Court erred in holding (R. 68) that the provisions of the Emergency Price Control Act governing procedure are adequate to preserve the constitutional

guarantee of due process of law, and in failing to hold that the action taken by the respondent in this case offends against due process.

V
QUESTIONS PRESENTED

The questions presented are—

1. Whether the respondent may establish an *average* uniform price for California table grapes without regard for the statutory requirements (a) that any price established must reflect *"the higher"* of certain prices determined and published by the Secretary of Agriculture, (b) that there may be no elimination or restriction of the use of brand names, and (c) that there may be no standardization of any commodity except under special circumstances not here present.

2. Whether the respondent may, in fact, establish any maximum prices for California table grapes in the absence of the determination and publication of certain data by the Secretary of Agriculture as required by the statute as conditions precedent.

3. Whether the establishment of a maximum price for California table grapes after sales and other related commitments have been made and shipments have actually begun—all to the detriment of petitioners, followed by the denial of a protest filed against such price, which denial was delayed until after the shipping season had terminated and was based upon the respondent's own conclusions and upon "evidence" previously and privately considered by the respondent, mostly contrary to sworn statements presented by petitioners, offends against due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

VI

STATUTORY PROVISIONS INVOLVED

The only statutes involved are the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. Appx. §§901, et seq., and the Stabilization, or Inflation Control, Act of 1942, 56 Stat. 765, 50 U. S. C. Appx. §§961, et seq. The provisions thereof, insofar as pertinent to the questions here presented, follow:

Stabilization Act

"Sec. 3.[4] No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grades, location, and seasonal differentials) or, . . .

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), . . .;

. . ."

Emergency Price Control Act

"Sec. 2. . . .

"(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices or methods, or means or aids to

[4] Section 3 of the Stabilization Act of 1942 superseded paragraphs (a) and (c) of Section 3 of the Emergency Price Control Act upon the suspension of the latter by the President on October 3, 1942, by Executive Order No. 9250 (7 F. R. 7871) pursuant to authority conferred upon him by Section 2 of the Stabilization Act.

distribution, established in any industry, except to prevent circumvention or evasion of any regulation, *or changes in established rental practices*, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."[5]

"(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; . . . (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; . . ."[6]

VII

SUMMARY OF ARGUMENT

Point 1. The only purpose of this suit is to have the protested regulation declared invalid. The first test of invalidity is whether the regulation is in accordance with or in violation of the statute itself. Without resorting to the details of prices and mark-ups it is here shown to be violative of several of the statutory provisions.

Point 2. The *minimum maximum* price which the respondent may establish for any agricultural commodity must reflect the *parity price* or the *highest price* received by the producers thereof between January 1, and September 15, 1942, *whichever is the higher.* The "parity" and "highest" prices to be used are those "determined and published by the Secretary of Agriculture". Inasmuch as the maximum price to be established by the respondent

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[5] Italicized matter added by Act of June 30, 1944 ("Stabilization Extension Act of 1944"), Public Law 383, 78th Congress.

[6] This subsection was added by the amendatory act of July 16, 1943, c. 241, §5(a), 57 Stat. 566.

must reflect the higher of these two prices, the failure of the Secretary to determine and publish either or both precludes the respondent from establishing any maximum. These conditions precedent not having been met herein, the respondent was without authority to establish the maximum prices in question.

Point 3. The parties conceded that the parity price need not be considered here for comparative purposes. Therefore, only the highest price received by the producers of California table grapes from January 1 to September 15, 1942, is material. However, no such price appears of record, and the respondent adopted, instead, a 1942 "season average price" for all varieties of California table grapes. Such a price cannot satisfy the statutory requirement of "the highest price", and its adoption renders invalid the maximum prices based thereon.

Point 4. Petitioners are growers and shippers of high-priced California table grapes, and one of them sells under a brand name which he has spent a considerable sum of money popularizing. By the action of the respondent in establishing an average price for *all* varieties he forces the higher-priced brands and grades to be sold at a lower-price level, thus effecting standardization to that extent. This compels the discontinuance of the use of the brand name or the deterioration thereof by the sale of a lower grade grape thereunder, with resulting loss to the owner; and in the case of *any* of the higher-priced varieties it forces the grower to take a loss. The regulation thus violates the statutory prohibition against the elimination or restriction of brand names and the standardization of a commodity.

Point 5. The establishment of a single price applicable to all varieties of California table grapes and based upon

a 1942 season average price not only tends to standardize the commodity as aforesaid but also disrupts the selling and shipping practices of the industry, which has always sold and shipped according to varieties, brands, and grades. It thus violates the statutory prohibition against the respondent's use of his powers to compel changes in business practices or in means or aids to distribution established in any industry.

Point 6. The action of the respondent in imposing maximum prices on California table grapes after the season was well under way, selling and delivery arrangements made, and shipments in progress, gave the petitioners no opportunity to adapt their operations to the lowered prices and changed practices; and the delays available to and utilized by the respondent postponed action on petitioners' protest until after the season had ended. This deprived petitioners of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

VIII

ARGUMENT

Point 1. The Fundamental Question as to the Validity of the Regulation Involved may be Determined by the Respondent's Fulfillment of the Statutory Requirements—not by any Monetary Standard.

The opinions of the respondent and of the Emergency Court appear to contrive to give the impression that the petitioners have not been financially injured, at least not of record, by the establishment of the maximum prices in question, and that, in any event, the prices are "generally fair and equitable." Such considerations are beside the point and merely serve to becloud the basic issue of law.

This is not a suit for damages. Indeed, damages may not be recovered regardless of their extent and of an ultimate

judicial decision adverse to the respondent. (A person need not even allege injury in order to qualify as a protestant of a regulation; he need only be "subject to" a provision thereof.[7])

This suit is for the only purpose permitted by the Emergency Price Control Act, namely, to determine whether or not the protested regulation is invalid.[8] Petitioners contend that the first test of invalidity is whether the regulation is in accordance with or in violation of the statute itself. (See *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 215, 49 L. ed. 449, 452; *Waite v. Macy*, 246 U. S. 606, 610, 62 L. ed. 892, 895; and *International Railway Co. v. Davidson*, 257 U. S. 506, 514, 66 L. ed. 341, 346.) The respondent may not substitute his whims for the will of Congress no matter how meritorious the results may be presumed or held to be.

If the regulation be found violative of any of the statutory provisions it must be declared invalid regardless of whether petitioners may be considered by the respondent, and also by the Emergency Court, to be the recipients, under the regulation, of at least the minimum return contemplated by Congress, or merely a return which the respondent and the Emergency Court consider generally fair and equitable.

Therefore, petitioners will not burden this Court with price and mark-up details.

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[7] Section 203(a) of the Emergency Price Control Act provides that "any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision . . ."

[8] Section 204(a) of the Act provides for the filing of a complaint "praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part," after which the Emergency Court has "exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding."

Point 2. Respondent was without Authority to Establish Maximum Prices for California Table Grapes.

Section 3 of the Stabilization Act[9] was obviously to protect the producers of agricultural commodities from the establishment of maximum prices which might be too low to provide them a fair return. That return was not to be below a certain minimum as "determined and published by the Secretary of Agriculture." That minimum, in turn, was to be the "*parity price*," or the "*highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942*," as adjusted by the Secretary for "grade, location and seasonal differentials," whichever was "*the higher*." In other words, determination and publication by the Secretary of Agriculture were conditions precedent to action by the respondent.

Therefore, before the respondent could fix any maximum price for any agricultural commodity he had first to ascertain the parity price and also the highest price received by the producers thereof between January 1 and September 15, 1942, as determined and published by the Secretary of Agriculture. If the Secretary had not published any such prices for the commodity which the respondent desired to place under price control it is clear that those prices were required to be published "by the Secretary" before the respondent could proceed.

Under Section 2(a) of the Act the respondent is required to accompany each regulation by a "statement of the considerations involved" in the issuance thereof. This Court indicated its familiarity with that requirement in the case of *Yakus v. United States*, 321 U. S. 414, 426, 88 L. ed. 653, 661:

> "The standards prescribed by the present Act, with the aid of *the 'statement of considerations' required to*

[9] See page 12, supra.

> *be made by the Administrator, are sufficiently definite and precise* to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. . . ." (Emphasis supplied.)

The parties have conceded, as stated (R. 64) in the opinion of the Emergency Court, that the 1942 prices for table grapes exceeded their parity price, and so only the 1942 prices need be considered as far as this case is concerned. But there is nothing in the statement of considerations, or even in the entire record, to indicate specifically and definitely what the highest 1942 price was between January 1 and September 15, 1942, as required by the statute.[10]

The lower court refers (R. 64) to the fact that the "1942 prices upon which the Administrator constructed his maximum prices were published in a bulletin entitled 'Prices Received by Growers for Fruit and Nut Crops' (Nov. 1943)

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[10] In the statement of considerations issued by the respondent in connection with the primary regulation to which the regulation here involved was an amendment, namely Maximum Price Regulation 426, specific reference was not made to a determination and publication by the Secretary of Agriculture, but it did state that the tables which were included "set forth the minimum requirements of Section 3 and the manner in which the prices established by the accompanying regulation for the basing points comply with these requirements." (R. 35.) Two tables followed covering the commodities involved, namely, lettuce and cabbage. As to lettuce there was given the "Parity price as of May 15, 1943," then the "Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted," followed by the "Season average price for 1942." (R. 35.) As to cabbage there were given the "Parity price as of May 15, 1943," and the "Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted." (R. 36.)

It should be noted that the Administrator took the "highest price," not the "season average", as the basis in each case. True, in the case of lettuce he made an adjustment to a lower price as permitted by Section 3 of the Stabilization Act "to correct gross inequities," but in the case of lettuce he adopted the "highest price between January 1, 1942, and September 15, 1942, seasonally adjusted." The "season average price" for lettuce was wholly ignored, and it was not even mentioned for cabbage. (R. 36-37.)

issued by the Bureau of Agricultural Economics of the Department of Agriculture." However, no such publication is identified in the statement of considerations, or even in the opinion (R. 19-29) accompanying the order (R. 18) denying the petitioners' protest. Certainly, no such bulletin, in whole or in part, appears in the present record, and it is not one of which judicial notice may be taken under the decisions of this Court. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100. (See footnote 21, page 34, post.)

It is submitted that in order to support the maximum prices established by the regulation the material parts of any pertinent determination and publication by the Secretary of Agriculture should have been incorporated in the statement of considerations so that all persons affected might be fully advised. Failing in that, they certainly should have been made a part of the evidence introduced by the respondent, and the petitioners should have been given adequate opportunity to examine and question them prior to the denial of their protest

The Emergency Court does not even refer to the highest price received in 1942, let alone the period from January 1 to September 15th, as required, for the various kinds of California table grapes, but only to the fact that, in the bulletin mentioned, "the growers of California table grapes in the year 1942 received an *average price* of $57.10 per ton."[11] (R. 64, emphasis supplied.)

The lower court seems content (R. 65) with its conclusion that the Secretary of Agriculture determined and published an *average* price. It thus approves the action of the respondent, as noted in the latter's statement of considerations, in using the "season average price in 1942 for California table grapes, for table use of all varieties", instead

[11] Cf. footnote 10, page 18, supra.

of "the highest price" received by the producers thereof between January 1 and September 15, 1942.

There having been no showing made of the determination of the minimum pursuant to the statutory requirement, it is submitted that the respondent had no authority to establish maximum prices for California table grapes.

Point 3. Even if the Respondent had the Authority to Establish Maximum Prices for California Table Grapes he had no Authority to Establish a Single Price Based on an Average 1942 Season Price for all Varieties.

In his statement of considerations the respondent states (R. 40):

> "The season average price in 1942 for California table grapes, for table use of all varieties, according to the War Food Administrator, was $57.10 per ton, at the first delivery point. . . ."

This is the nearest he comes to citing a "determination and publication by the Secretary of Agriculture". But, assuming that this reference is sufficient to indicate that the Secretary has determined and published the "highest price received" by California table grape producers between January 1 and September 15, 1942, adjusted for grade, location and seasonal differentials, the question still remains as to whether the adoption by the respondent of the "season average price in 1942 for California table grapes, for table use of all varieties" is a compliance with the statutory requirement that the maximum price established shall be the "highest price" received by the producers of the commodity during the designated 1942 period.

It might be quite diverting, and possibly the respondent may choose to engage in such diversion, although the bases therefor are lacking in the present record, to discuss how the "highest price" is or should be determined by the

Secretary of Agriculture, and how it should be seasonally adjusted. However, the "highest price" as determined by the Secretary is supposed already to have been adjusted as required by the statute, so the only problem here is to ascertain the "highest price" as determined and published by the Secretary.

Under this *Point 3* of petitioners' argument it is assumed that the necessary determination of the "highest price" has been made, and it may also be that he determined a "season average price" as indicated by the respondent. That is immaterial. The fact is that the respondent took a "season average" rather than the "highest" price. This is quite different from the procedure shown (R. 35) to have been followed in the case of lettuce, which is certainly just as much an agricultural commodity as table grapes. Although the statement of considerations (R. 32-38) covering lettuce did not specifically mention a determination and publication by the Secretary of Agriculture, there was included a table which purported to be in pursuance of the statute and which contains the following items (R. 35):

Parity price as of May 15, 1943	$1.72 per crate.
Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted	$4.05 per crate.
Season average price for 1942	$2.55 per crate.

Of course, the first two items, namely, the "parity price", and the "highest price" during the period specified by the statute, are the only ones which are essential for the respondent's purpose under the law because his duty is to select "the higher" of those two. Nevertheless, the third item, namely, "season average price for 1942", is intensely interesting for the reason that it shows how great a difference there may be between a "season average", as taken by the respondent in the case at bar, and the "highest price" between January 1 and September 15, 1942, as re-

quired by the statute, but as ignored by the respondent in the instant proceeding.

The obvious question is: "Why did the respondent base his establishment of a maximum price for lettuce [12] on the 'highest price' during the designated 1942 period, and then take the 'season average' 1942 price, without even mentioning the 'highest price', when he established the maximum price for California table grapes?" (Maybe it was because the Secretary had not determined and published a "highest price", as required by the statute as conditions precedent. That possibility, or fact, was discussed under *Point 2,* supra.)

The tables appearing in the record herein (R. 15, 31) clearly indicate the wide range of prices [13] of California table grapes, depending upon varieties and the grades within the varieties. As the Emergency Court observed (R. 67-68), a given variety may not always enjoy the same relative position in the selling-price structure. This is readily understandable because of the seasonal difference in volume and quality due to climatic and other conditions.

When Congress inserted the provision regarding the highest price received by producers from January 1 to September 15, 1942, it obviously referred to each agricultural commodity which was to be placed under price control. The petitioners contend that in the case of California table grapes, where there is a wide range of prices among the various varieties, *each variety* must be treated as a *single com-*

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[12] Although it be immaterial to the present discussion, it should be noted for the sake of accuracy that, in the case of lettuce, the Administrator adjusted the "highest price" to a lower price as permitted by Section 3 of the Stabilization Act in order "to correct gross inequities." (R. 36.)

[13] On November 2, 1942, the price range of California table grapes was from $1.90 per lug for Tokays to $4.15 for Ribiers. (R. 15.)

modity and a maximum price fixed therefor.[14] Petitioners further contend that, if the word "commodity" be held to comprehend all varieties of California table grapes within the legislative intendment, the respondent should adopt the "highest price" which was received by producers of the variety commanding the best price during the period from January 1 to September 15, 1942. This would take care of all varieties, including those which sold at an unusually low price at that time, and it would also serve to comply with the prohibition of Section 2(j) of the Emergency Price Control Act against standardization, as hereinafter discussed under *Point 4.*

Therefore, regardless of whether the "highest price" be taken for each variety of California table grapes, or for the highest-priced variety, or for all varieties considered as one commodity, it is clear that the "highest price", as such, must be taken and not the "season average price in 1942". The action of the respondent in taking the latter price was an obvious violation of the statutory requirement.

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[14] The respondent rejects any method of pricing table grapes by varieties because of what he considers to be practical difficulties of enforcement. (R. 23, 25.) In his opinion (R. 23), he gives as a primary reason for a single price the fact that the average consumer cannot distinguish between different varieties of table grapes. However, this problem, if it be such, has always been present and there is no indication that it has been a real one. The consumer, dealing with responsible sellers, can and does buy table grapes with the same assurance as to grade and quality that he buys numerous other products. The ordinary consumer is unable to make fine distinctions as to varieties and grades of many products whether or not they are subject to price control. He must rely upon the integrity of the retailer. If the latter be dishonest, the chances are that he will eventually be caught, even though it may take someone other than a consumer to do it.—Certainly any impracticability in connection with the enforcement of ceilings for different varieties was not mentioned in the respondent's statement of considerations. (R. 39-41.) Apparently, it was an afterthought.

Point 4. The Establishment of a Single Maximum Price for California Table Grapes Based upon a Season Average for 1942 for all Varieties in Violative of the Statutory Prohibition Against the Elimination or Restriction of Brand Names and the Standardization of the Commodity.

Section 2(j) of the Emergency Price Control Act prohibits the elimination or restriction of the use of trade and brand names, and also the standardization of any commodity unless the Administrator shall first determine that no practicable alternative exists for securing effective price control thereof.

The fact is uncontradicted that petitioner Urick ships choice grapes under his brand name "Poinsettia"; that he has spent large sums of money in popularizing and promoting this name; that the grapes sold thereunder command a price far in excess of the average and cannot be sold at the maximum provided by the regulation without severe loss; and that if he should temporarily discontinue the use of his brand name or sell a poor quality of grapes thereunder he would destroy the value of the name. (R. 5.)

Petitioner Urick's position is not unique. Many growers and shippers have, by special and expensive methods of cultivation, developed highly specialized grades of table grapes which they ship under brand names at premium prices. (R. 4.)

The fact is also uncontradicted that petitioner Powers is a grower of several varieties of table grapes, including Emperors and Malagas; that under ordinary circumstances Emperors are one of the higher-priced table grapes, while Malagas are a medium-priced variety; that Emperors are produced at the rate of three to four tons per acre whereas the same acreage and conditions will produce five to six tons of Malagas; that the Emperor season is longer; that

it costs approximately 25% more to produce Emperors than it does Malagas; that there is a higher percentage of weather damage and crop failures in the case of Emperors; and that there must be, and normally are, price differences between the two varieties. (R. 3-4.)

It therefore follows that any single maximum price which is supposed to cover all varieties will not be sufficient to protect the growers of the higher-priced varieties unless it is relatively high—higher than an *average* price based upon 1942 sales of all varieties. To illustrate: if the growers of the cheaper varieties received $1 per unit in 1942, while the growers of the more expensive varieties received $3, creating an average price of $2, the establishment of that price as the maximum for all varieties would penalize the grower of the choice grapes.

Where the grower also has a brand name which he has spent time and money in establishing, as in the case of petitioner Urick's "Poinsettia", it is incumbent upon him to keep that name before the public in order not to diminish its value. However, he cannot do that without immediate financial loss unless he substitutes lower-priced grapes for sale under that name—grapes which he can afford to sell at the $2 uniform ceiling. However, as soon as he does this his brand name deteriorates in the public view and may ultimately be eliminated as a useful adjunct to his business.

Thus, whether the high-priced grapes are sold under a brand name like Poinsettia, or under a recognized variety name like Emperor, the effect of establishing an average price as a maximum is to standardize the commodity, at least as to the average and high-priced varieties. (It might be assumed that the producers of lower-priced varieties might benefit by being permitted to sell at the higher (ceiling) price, but such a situation would be controlled by sup-

ply and demand and the forces of competition, just as in the absence of any price control, when low-grade products *may* be sold at high prices.)

As heretofore noted, the Act prohibits not only the elimination or restriction of the use of brand names, but also the standardization of any commodity unless the respondent Administrator first determines that no practicable alternative exists for securing effective price control. The latter prohibition may well be considered the more important inasmuch as it may comprehend the former, so the question to consider is whether there has been a determination that no practicable alternative exists.

Reference has already been made (*Yakus* case, supra) to the importance which this Court attaches to the statement of considerations which the respondent is required to issue in connection with every regulation promulgated by him. It is, among other purposes, to enable the court to ascertain whether the Administrator has conformed to the standards prescribed by the Act.

An examination of the statement of considerations (R. 39-41) issued in connection with the regulation here involved quickly discloses that there was no determination by the respondent, as required by the statute, that there exists no practicable alternative to standardization of California table grape prices in order to secure effective price control thereof. There is merely the catch-all conclusion that "it is the judgment of the Price Administrator and the War Food Administrator that the maximum prices established by the accompanying amendment will reflect to growers prices which fully comply with the Emergency Price Control Act of 1942, as amended". (R. 41.) Certainly, such a statement does not meet the suggestion which may properly be inferred from the language used by this Court in the *Yakus* case, supra, that a sufficient disclosure must be made by the

respondent in his statement of considerations so that "the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting." (321 U. S. 423, 88 L. ed. 659.)

Furthermore, the establishment of a single maximum price based upon an average season price for all varieties is contrary to the recommendations of the California table grape industry. The opinion of the respondent accompanying his order denying the protest, and also the opinion of the Emergency Court in upholding the respondent in so doing, place considerable reliance upon a statement (R. 58-61) made by a committee selected by the California table grape growers. (R. 23, 67.) However, no reference was made to the industry in the statement of considerations.

It is illuminating to read the industry committee's observations *in addition* to those quoted (R. 67) by the Emergency Court. It objected to any price ceilings on California table grapes because, among other reasons, of the extremely wide range in values and the large number of varieties. However, if price ceilings were to be established the committee recommended one over-all ceiling for all varieties, "*with due allowance for the actual price ranges as they exist.*" Then it pointed out that "*any average price cannot possibly be construed as satisfying the provision of the Act requiring use of the highest price,* or for carrying out in any degree the intent of Congress."[15]

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[15] The committee selected by the California table grape growers stated, inter alia (R. 59-61):

> "This committee is unalterably opposed to price ceilings on California table grapes because of the extreme wide range in values, the large number of varieties involved, the highly perishable nature of the commodity, the hazards of weather, the uncertainty of labor supply, and many other risks, all of which in themselves are too detailed to discuss and analyze in this general statement, . . .
>
> "Therefore, if price ceilings *are* established we recommend *one over-all ceiling* for *all* varieties of table grapes, *with due*

It would, therefore, appear that the establishment of a maximum price based upon an average season price is really contrary to the recommendations of industry. However, a more compelling factor invalidating such a maximum price is admittedly its violation of the statutory prohibition against the elimination or restriction of brand names and the standardization of a commodity.

Point 5. The Establishment of a Single Maximum Price for California Table Grapes Violates the Statute by Compelling Changes in the Business Practices Established in the Industry.

Section 2(h) of the original Price Control Act prohibits the respondent from using his powers "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry,

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allowance for the actual price ranges as they exist. We recognize such an over-all price ceiling would have to be relatively high, but we are of the opinion that any price ceilings by varieties would be so complicated and so difficult of enforcement they would break down completely. . . .

". . . The Emergency Price Control Act of 1942, as amended, provides in Section 3, paragraph 2, that the highest price between January 1 and September 15, 1942, shall be one of the bases for determining the minimum grower price permitted under the Act. In their negotiations concerning proposed price ceilings for Bartlett pears, representatives of the Bartlett pear industry of the Pacific Coast were told by you that this provision of the Price Control Act is interpreted to permit the *season average price* for 1942 to be used as the highest price. Should your department propose a similar interpretation of the Act in the case of grapes for table use we point out once more that the official market news reports covering the 1942 sales of all table stock at all auctions shows a *daily average price range of from $1.72 per package to $4.12 per package for an average of $2.09 per package,* which we consider is ample *proof of the fact that any average price cannot possibly be construed as satisfying the provision of the Act requiring use of the highest price,* or for carrying out in any degree the intent of Congress."

except to prevent circumvention or evasion of any regulation". By the Act of June 30, 1944 (Stabilization Extension Act of 1944), this prohibition was clarified by inserting the requirement that such changes may only be compelled where they are "affirmatively found by the Administrator to be necessary" to prevent such circumvention or evasion.

California table grapes are normally shipped under established industry practices and sold by varieties and brands. The fact is uncontroverted that the many varieties sold are shipped under four general classifications: "United States Fancy", "United States No. 1", "United States No. 2", and "Unclassified". (R. 3-4.)

The petitioners show (R. 3) that there are eight major varieties regularly shipped from the San Joaquin Valley area and the respondent asserts (R. 22) that information has been compiled with respect to 30 varieties of California table grapes. Tables furnished by the petitioners (R. 14-15) and by the respondent (R. 30-31) show an appreciable movement of the eight important varieties, with a wide range of prices.

It is thus apparent that, from an industry standpoint, there has been no difficulty concerning the distinction between grades and varieties either for the purpose of shipment or sales. However, the respondent would disregard this established industry practice and method of distribution and sale by standardizing the various varieties and grades through the medium of a single average price covering all varieties. He does this with the solemn suggestion in his opinion (R. 23), but not in his statement of considerations, that separate prices for each variety "would lead to confusion and evasion of the regulation, with the likelihood that all varieties would tend to be sold at the price of the highest-priced variety". He thus substitutes his administrative judgment for an industry practice, which

has developed over a period of years, and artificially creates a condition under which there is no incentive on the part of the California growers of the higher-priced varieties and grades to ship their products.

Therefore, it is submitted that the action of the respondent in fixing a single maximum price not only violated the provisions of Section 2(j) of the Act prohibiting elimination or restriction of the use of brand names or the standardization of a commodity, but also violated Section 2(h), which prohibits changes in business practices and means of distribution established in any industry.

Point 6. The Procedure Followed by the Administrator in Issuing the Regulation Involved and in Acting upon the Protest Filed Against it Constituted a Violation of the Constitutional Guarantee of Due Process.

The question of due process under the Emergency Price Control Act was presented to this Court in *Yakus v. United States*, supra. However, there no proceedings were had before the Administrator. It was a criminal case, and the defendant did not question the regulation involved or the validity of the Act until he was charged with violation thereof. However, this Court examined the provisions of the statute and came to the conclusion that "the authorized procedure is *not incapable* of according the protection to petitioners' rights required by due process."[16] In other

[16] This Court stated (321 U. S. 434, 88 L. ed. 665):

"For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny such hearing

words, it was held that the statute itself was *capable* of affording due process, but the Court left open the question of whether the Administrator, in a particular proceeding brought in pursuance of the Act, failed in the performance of any duty imposed upon him, or denied such hearing as the Constitution prescribes. *Such a case is here presented.*

The case at bar was instituted by a protest pursuant to the statutory provision. This was done on September 27, 1943, well within the 60 days provided by the statute from the date the regulation was issued, August 19, 1943. (R. 1-9.) On the latter date the shipping of California table grapes was already in progress and the petitioners had made various commitments concerning the time and terms of sale and delivery of grapes, and arrangements for the purchase of materials and other facilities for the transportation, packing and shipment thereof. (R. 3.) As a matter of fact, the grape harvesting season begins in June and is concluded early in December (R. 58)—a fact which was well known to the respondent. However, no tenable reason, much less an apology, was given for delaying the imposition of a maximum price until two months after the harvest had actually begun, and for some time after shipping commitments had been made and actual shipping had commenced.[17]

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as the Constitution prescribed. . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphases supplied.)

[17] No reason whatsoever is given in the statement of considerations. (R. 39-41.) However, in his opinion accompanying the order denying the protest the respondent states (R. 21):

"The Price Administrator is in full accord with Protestants' recommendation for early issuance of regulations governing maximum prices of seasonal commodities, and if it had been possible maximum prices for table grapes would have been issued prior to August 19, 1943. . . ."

This action of the respondent in selecting such an inopportune time for issuing maximum prices for California table grapes prejudiced petitioners and other growers and shippers thereof. Even though the respondent had acted "within a reasonable time" upon their protest, as required by the statute, they could not possibly have filed a complaint in Court and obtained a decision before the end of the shipping season. In other words, their entire business, which is dependent upon a relatively short seasonal operation, may be changed or destroyed completely by the action of the respondent, illegal though it may be, taken at a time when they are committed as to their disbursements but not safeguarded as to their receipts.

Although the respondent did act upon petitioners' protest on October 29th—more than 30 days after the filing thereof, but within 90 days from the issuance of the regulation, all that he did, as unfortunately permitted by the Act,[18] was to deny petitioners' request for an oral hearing and afford an opportunity (30 days) to present further evidence in affidavit form. (R. 10-11.) The petitioners followed the only procedure open to them—they filed an affidavit as promptly as possible, November 12, 1943. (R. 12-17.) This sort of delaying action on the part of the respondent may go on interminably unless checked by order of the Emergency

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[18] Section 203(a) provides that—

". . . *Within a reasonable time* after the filing of any protest under this subsection, *but in no event more than thirty days after such filing or ninety days after the issuance of the regulations or order* . . . in respect of which the protest is filed, whichever occurs later, *the Administrator shall* either *grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith.* . . . (Emphasis supplied.—*Note:* The 90-day provision was eliminated by the Act of June 30, 1944.)

Court.[19] However, the delay necessarily occasioned in obtaining such an order (petition, answer, argument, and possible rehearing) minimizes any benefit which might be obtained by ultimate action of the respondent.

Probably the petitioners would have been more practical if they had recognized that, because of the inexcusably late imposition of maximum prices upon their products, together with the endless delays available to the respondent under the protest and review provisions of the Act, a protest would be a waste of time. But hope still springs eternal in the human breast and, too, the petitioners were convinced of the justice of their position and they also thought that, perhaps, the respondent would hasten action upon their protest under the circumstances and grant relief prior to the end of the season.

Furthermore, an average price structure for all varieties of table grapes, as here imposed, will continue invalid unless Congress amends the Act to conform to the respondent's methods, and the only apparent possibility of relief

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[19] The original Emergency Price Control Act made no specific provision for shortening any unreasonable delay (beyond the statutory limit) on the part of the Administrator, but the Emergency Court held that it had power to issue an order in the nature of a writ of mandamus upon a proper showing. *Safeway Stores v. Brown*, 138 F. (2d) 278, certiorari denied 320 U. S. 797. By the amendatory Act of June 30, 1944, the following subsection was added to Section 203:

> "(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period."

is through a review by this Court.[20] Petitioners naturally desire to have such benefit as compliance with the statutory requirements may afford them because without it they, as producers of higher-priced table grapes, must suffer not only disruption in their established business practices but also immediate financial loss.

Although the inadequacy of respondent's statement of considerations, the delays occasioned by him and permitted by the Act, his opinion with its conclusions and references to matters not of record,[21] followed by the decision of the

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[20] The respondent is still up to his old tricks. On August 2, 1944, he issued Amendment No. 46 (9 F. R. 9509) to Maximum Price Regulation No. 426, superseding the amendment here involved but retaining the objectionable and invalid *average price* basis and even reducing the return to producers. Significantly, this was also *issued after the season was well under way*, although in Amendment No. 50 (9 F. R. 10,192), issued August 18, 1944, he claimed that Amendment No. 46 was issued "on very short notice." He admitted that the prices which it established were "considerably lower than the going market prices," and he postponed to August 28th the effective date of the amendment under certain conditions.

[21] In the case of *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100, this Court stated:

> ". . . From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or *even government reports* are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, *withholding from the record the evidential facts* that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (Emphases supplied.)

Emergency Court long after the season terminated and even after another had begun, leave much to be desired in the way of due process, the primary complaint of petitioners concerns the date of the imposition of the maximum prices in the first place.

In other words, the lack of due process in this case stems from the respondent's failure to synchronize the establishment of maximum prices of California table grapes with the seasonal factors involved. Admittedly, as suggested by this Court in the *Yakus* case, supra, the respondent *might* have afforded due process. *But he did not.* He waited until the producers and shippers had made their seasonal arrangements for disposing of the table grape crop and then, while they were in the process of pursuing their usual methods of distribution, he imposed price ceilings. If this had been done reasonably in advance of the table grape season they could have made adjustments accordingly, or they could have filed a protest with more hope of relief before it was too late.

Here the respondent made a mockery of such due process as the Act afforded by issuing his regulation at a time when, as far as that season was concerned, it proved to be only an empty satisfaction to follow the procedural steps provided. The only benefit to accrue from a review by this Court and a declaration that the "season-average" single-price basis is in violation of the statute and renders the regulation invalid will be the effect which it may have upon the respondent in his future actions. Certainly petitioners may not recover from anyone such losses as they may have incurred as a result of their operation under the regulation during the 1943 season, regardless of the fact that the regulation may be declared wholly invalid.

However, it is submitted that such considerations only accentuate the need for procedural due process at the very

outset, and that the respondent's failure to accord it renders invalid the regulation in question.

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that both the substantive and procedural provisions of the Emergency Price Control Act, as amended, may be given the effect intended by Congress and required by the Constitution; and that to such end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

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September 2, 1944.